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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Revision or Elimination of Rules Under
The Regulatory Flexibility Act,
5 U.S.C. § 610

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DA 05-1524

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Federal Communications Commission
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**COMMENTS OF
THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.**

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to the Commission's May 31, 2005 *Public Notice* in this matter¹, hereby submits its comments on the Commission's proposal under the Regulatory Flexibility Act² to, *inter alia*, revise or eliminate certain rules in Part 27 to minimize adverse impacts on small business entities operating on the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") spectrum. Specifically, WCA urges the Commission to revise Section 27.1212 of the Rules to afford BRS and EBS licensees 15-year license terms, thereby facilitating the efforts of small business entities to fund the deployment of innovative new cellularized broadband networks in the 2.5 GHz band.

WCA is the trade association of the wireless broadband industry. Its members include, among others, entities that will utilize BRS and EBS spectrum to deliver a wide variety of video, voice and data services via capital-intensive wireless technology to consumer and business subscribers. Included within WCA's membership are a wide array of smaller system operators that in many cases will be providing the only broadband service in less densely populated areas of the country. Accordingly, WCA has a strong interest in the Commission's proposal to

¹ *FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under The Regulatory Flexibility Act*, 5 U.S.C. 610, Public Notice, DA 05-1524 (rel. May 31, 2005) ["Public Notice"].

² 5 U.S.C. § 610.

eliminate Part 27 rules that impose unnecessary burdens on smaller entities that utilize BRS/EBS spectrum.

As observed in the *Public Notice*, the purpose of the Commission's review here is to determine whether the specific rules identified for review "should be amended or rescinded, . . . , to minimize any significant economic impact of the rules upon a substantial number of . . . small entities."³ Of particular relevance to WCA's proposal is the Commission's obligation to consider, among other things, "the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule[s]."⁴

The current review of Part 27 under the Regulatory Flexibility Act coincides with the Commission's nearly-completed overhaul of its BRS/EBS rules in WT Docket No. 03-66. Based largely on the October 7, 2002 "white paper" submitted by WCA, the National ITFS Association and the Catholic Television Network,⁵ the Commission's *Report and Order* in that proceeding was a critical first step towards facilitating more rapid deployment of BRS/EBS-based broadband services, principally by rationalizing the 2.5 GHz bandplan, substituting a Part 27-like regulatory model in lieu of the antiquated broadcast-like model in Parts 21 and 74, and giving BRS/EBS operators greater technical flexibility to provide new services in response to consumer demand (particularly non-line of sight mobile and portable broadband services that require a highly-cellularized network design).⁶ While the *Report and Order* remains subject to further refinement via the reconsideration process and a pending *Further Notice of Proposed*

³ *Public Notice* at 1. See also 5 U.S.C. § 610(a).

⁴ *Public Notice* at 1. See also 5 U.S.C. § 610(b)(5).

⁵ See "A Proposal for Revising The MDS and ITFS Regulatory Regime," The Wireless Communications Association International, Inc. *et al.*, RM-10586, (filed Oct. 7, 2002).

⁶ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 MHz and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) ["BRS/EBS R&O and FNPRM"].

Rulemaking in the same docket, it has created a foundation for provision of a new generation of wireless broadband services. However, it is essential that the Commission continue to identify and correct obsolete BRS/EBS rules that could impede the substantial progress the agency has already made in WT Docket No. 03-66.

As observed by the Commission's Spectrum Policy Task Force, "a level of certainty regarding one's ability to continue to use spectrum, at least for some foreseeable period, is an essential prerequisite to investment, particularly in services requiring significant infrastructure installation and lead time."⁷ Thus, of the specific BRS/EBS rules under review in the *Public Notice*, WCA is most concerned with Section 27.1212, which sets the BRS/EBS license term at 10 years. The Commission's original adoption of a 10-year license term for BRS/EBS came when the 2.5 GHz band was utilized almost exclusively for the provision of video programming, and the capital-intensive highly-cellularized broadband networks envisioned by WT Docket No. 03-66 then were unimaginable. Moreover, at the time, Section 307(c) of the Communications Act of 1934, as amended, limited non-broadcast licenses to a ten-year term. Given the industry's evolution, however, a 10-year license term now is insufficient to provide smaller BRS/EBS providers with the regulatory certainty that justifies the enormous investments necessary to successfully launch BRS/EBS cellularized service under the new bandplan and related transition and technical rules now being finalized in WT Docket No. 03-66. And, with the passage of Section 203 of the Telecommunications Act of 1996, Congress has authorized the Commission to grant licenses with longer terms.⁸ Both the BRS/EBS industry and consumers would benefit from an increase in the BRS/EBS license term from 10 years to 15 years.⁹

⁷ Report of the Spectrum Policy Task Force, Federal Communications Commission, ET Docket No. 02-135, at 23 (Nov. 2002).

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, Title II, § 203, 110 Stat. 56, 112 (1996).

⁹ A rational argument can be advanced that the Commission should increase the license term even beyond the 15-year term that WCA is proposing here. The costs associated with deploying highly-cellularized broadband networks capable of providing fixed, portable and mobile video, voice and

A 15-year BRS/EBS license term will promote the funding of capital-intensive cellularized wireless broadband systems under the new 2.5 GHz regulatory framework by affording smaller BRS/EBS operators additional time to achieve an adequate return on investment. The new cellularized operating paradigm requires the BRS/EBS operator to make significant financial outlays even before it has launched commercial service to the public. Because investors rationally desire business plans that call for the recovery of such costs within the life of the license, a term of at least 15 years will ensure that the operator (particularly a smaller one with limited financial resources) has a legitimate opportunity to secure the capital needed to deploy the 2.5 GHz band for commercial services under the entirely new regulatory model.¹⁰ As the Commission put it in WT Docket No. 03-66:

data services under the new EBS/BRS rules will be massive. While a license term longer than 15 years would no doubt even further promote investment, WCA appreciates that there may be concerns over license terms exceeding 15 years and is thus limiting its request to that term.

¹⁰ Much of the policy rationale for affording BRS/EBS licensees a 15-year license is reflected in the Commission's 1998 *Report and Order* in MM Docket No. 97-217, in which the Commission adopted the original 2.5 GHz band two-way rules now under revision in WT Docket No. 03-66. There the Commission extended the permissible EBS (then known as ITFS) lease term from 10 years to 15 years, stating the following:

[i]n extending permissible excess capacity lease term limits to 10 years a few years ago, the Commission recognized that "the wireless cable industry requires substantial equity investment in order to become a viable competitor. . . . We also realize that a potential financier is likely to exercise caution . . . where there is uncertain long-term availability of the ITFS channels that provide the basic capacity for that system." [...T]he conversion to digital operations, whether two-way or merely downstream, will entail a substantial increase in operational and infrastructure costs, and the investment community will require even far greater comfort regarding the long-term availability of excess capacity on ITFS channels. In addition, we agree with the commenters who have suggested that a 15 year lease term limit will help to place wireless cable on a more equal footing with its competitors. Higher Education Alliance, for instance, argues that 15 years is the customary period for traditional cable franchises, so that extending the term limits here hopefully would enable wireless cable operators to access capital markets that traditionally support wired cable. Furthermore, . . . a 15 year lease term limit also will help provide greater certainty to ITFS licensees, which, for instance, may appreciate the assurance of long-term, stable maintenance and operational support offered by a longer lease term.

Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, Report and Order,

[w]e recognize that the ultimate success in recreating this band is also closely linked to the availability of investment dollars in support of wireless broadband services. We believe that our [new] rules create a more stable environment that will promote additional capital investment.¹¹

WCA agrees, and thus urges the Commission to promote investment in the 2.5 GHz band by extending the BRS/EBS license term from 10 years to 15 years. The Commission has previously adopted 15-year license terms for other services with capital-intensive buildout requirements, and should do the same here.¹²

13 FCC Rcd 19112, 19183 (1998) (footnotes omitted). Unfortunately, because the MDS/ITFS license term remained fixed at 10 years, the Commission's extension of the permissible ITFS lease term did not provide the same degree of certainty that would have been realized had the license term also been extended. Then, as now, the Commission did not permit an ITFS lease term to run beyond the term of the underlying license. As a result, the Commission's effort to provide additional certainty by extending the permissible ITFS lease term was somewhat undermined by the retention of the 10-year ITFS license term.

The Commission should take note that nothing WCA states here should be read as inconsistent with the position WCA has taken in WT Docket No. 03-66, opposing efforts by some educators to secure re-imposition of the 15-year EBS lease term that was eliminated last year. As WCA has addressed during the reconsideration phase of WT Docket No. 03-66, the Commission wisely decided in the *BRS/EBS R&O and FNPRM* to replace its antiquated system for regulating EBS excess capacity leases with a system based on the rules and policies adopted in the Commission's *Secondary Markets* docket and applied to all other services. See *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14234. Thus, WCA has vigorously argued that the Commission should not re-impose a limit on the term of EBS excess capacity leases, other than to make them subject to the term of the underlying license. See Consolidated Opposition to Petitions for Reconsideration of Wireless Communications Ass'n Int'l, Inc., WT Docket No. 03-66, at 30-35 (filed Feb. 22, 2005). There are sound economic reasons why system operators and EBS lessors will desire to enter into leases extending beyond 15 years, and no valid reason has been advanced in WT Docket No. 03-66 for denying them the opportunity. See *id.* WCA is willing, as a matter of pragmatism, to accept a 15-year license term. See *supra* note 9. That does not mean, however, that lease terms should not extend longer to provide lessors and lessees with greater certainty and flexibility in crafting their relationships.

¹¹ *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14301

¹² See *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127, 16175-6 (2000)(awarding 15-year license terms to MSS); *Service Rules for Advanced Wireless Services in the 1.7 and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25190 (2003)(awarding Advanced Wireless Services licensees in the 1710-1755/2110-2155 MHz band a 15-year initial license term, finding that "the circumstances surrounding the future development and deployment of services in these bands warrant an initial license term longer than 10 years in order to encourage the investment necessary to develop these bands). While not entirely analogous to the government relocation process at 1710-1755 MHz, the process of transitioning BRS/EBS licensees to the new 2.5 GHz bandplan certainly will entail substantial time and expense as well, and thus justifies a similar extension of the BRS/EBS license

In sum, extension of the BRS/EBS license term from 10 years to 15 years would be entirely consistent with the Commission's statutory mandate to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."¹³ WCA therefore urges the Commission to amend Section 27.1212 of its Rules as proposed above.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: 

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128
202.783.4141

Its Attorneys

September 1, 2005

term to 15 years. WCA does not agree, however, that there is a valid rationale for the Commission to revert to a 10-year term after the licensee's initial 15-year term has expired. *See id.* The factors which support a longer license term (*e.g.*, regulatory certainty, sufficient time to achieve return on investment, etc.) are the same whether the licensee is in its initial license term or in a renewal term thereafter.

¹³ *Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report, 19 FCC Rcd 3034, 3037-38 (2003), quoting 47 U.S.C. § 257(a). *See also* 15 U.S.C. § 631a(a) ("[f]or the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary . . . in order to: foster the economic interests of small businesses . . .").